

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

IN RE: ETHICON, INC. PELVIC REPAIR SYSTEM
PRODUCTS LIABILITY LITIGATION

MDL No.
2:12-MD-2327

December 20, 2013
Huntington, West Virginia

TRANSCRIPT OF TELEPHONIC STATUS CONFERENCE
BEFORE THE HONORABLE CHERYL A. EIFERT
UNITED STATES MAGISTRATE JUDGE

APPEARANCES (by telephone)

For the Plaintiffs:

BRYAN F. AYLSTOCK, ESQ.
D. RENEE BAGGETT, ESQ.
AYLSTOCK WITKIN KREIS & OVERHOLTZ
Suite 200
17 East Main Street
Pensacola, FL 32502

For the Defendant:

WILLIAM M. GAGE, ESQ.
BENJAMIN M. WATSON, ESQ.
GARY RUBIN, ESQ.
BUTLER SNOW O'MARA STEVENS &
CANNADA, PLLC
P. O. Box 6010
Ridgeland, MS 39158-6010

Court Reporter:

TERESA M. RUFFNER, RPR
Sidney Christie Federal Building
845 Fifth Avenue, Room 101
Huntington, WV 25701
(304) 528-7583

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1 Friday, December 20, 2013, at 2:00 p.m. in conference room

2 THE COURT: Hello.

3 MR. GAGE: Hi. Good afternoon.

4 THE COURT: Okay.

5 MR. GAGE: Hi, Judge.

6 THE COURT: Mr. Gage.

7 MR. AYLSTOCK: Good afternoon, Your Honor. Bryan
8 Aylstock here.

9 THE COURT: Mr. Aylstock.

10 MS. BAGGETT: Your Honor, Renee Baggett for the
11 plaintiffs.

12 THE COURT: Miss Baggett. All right. Well, what do
13 we have going on today?

14 MR. AYLSTOCK: Well, Your Honor, Bryan Aylstock for
15 the plaintiffs. I guess a couple of things that are on the
16 front burner for us in light of some upcoming depositions
17 right after the holidays, and, in particular, there's a
18 deposition of a gentleman named Tom Barbolt, B-a-r-b-o-l-t,
19 and he is a -- one of the research scientists for Ethicon.

20 He's actually been deposed. He was deposed in the
21 New Jersey litigation in advance of the Gross trial by
22 Mr. Anderson and then by my partner, Mr. Thornburg, in the MDL
23 several -- five or six months ago, I believe, and he has also
24 been designated as a non-retained expert witness by Ethicon,
25 and he is also designated on a number of 30(b)(6) topics

1 related to some of the testing done related to claims in the
2 instructions for use and specifically claims related to the --
3 the instructions for use say that the inflammation, if it
4 exists, is minimal to slight and transient, I think are the
5 operative words, and he relies on some studies for that and
6 also that the polypropylene doesn't -- is not subject to
7 degradation, which is another study.

8 But that deposition is set to take place on January 7th
9 and 8th, and we -- Mr. Watson and I had a call earlier, a
10 couple of days ago, about the need to get some additional
11 background information on those particular studies.

12 A little more background: There's two studies, rat
13 studies. One is a 91-day study and one is a 28-day study that
14 looked at the inflammatory response in the back of a rat of a
15 little piece of the TVT mesh when it was placed in there for
16 28 and 91 days, and the rats were sacrificed and so on and so
17 forth.

18 Well, we had asked for, as the Court is aware from our
19 motion to compel hearing back in July -- or June, I believe --
20 back in July 2012, we had asked for, you know, all underlying
21 data related to any studies that supported claims in the
22 instructions for use; and, in particular, we were very clear,
23 we asked for lab notebooks about those studies.

24 There's also a study related to degradation that is
25 relied on for the statement about the polypropylene does not

1 degrade, and it's a study about where some PROLENE was put in
2 dog hearts. And so those three studies in particular are very
3 important to us because they supposedly or allegedly support
4 the claims made in the IFU that we and our experts say are
5 false and misleading and, you know, frankly are relied upon by
6 many physicians in deciding what product to use and whether a
7 mesh should be used at all, because what we've seen in
8 Miss Lewis and others is that the inflammation is, in fact,
9 severe and chronic and so forth, or at least moderate and
10 chronic, as opposed to minimal to slight and transient.

11 Well, we learned Wednesday that, in fact, in follow-up
12 for some of the back-ups, tissue and tissue slides to those
13 studies, that apparently Mr. Barbolt does have lab notebooks
14 for the two studies he was involved in, the rat studies, and I
15 believe -- and Mr. Watson can correct me -- they were either
16 at his house or there's some vault where they may be.

17 And given -- given that we really need that information
18 in very short order in order to conduct this deposition, which
19 given the timing of everything, we really have no interest in
20 moving the deposition. We need to move forward with it. But
21 what we need your help with, I think, is -- and maybe
22 Mr. Watson has some more information for us, but just need
23 that -- those lab notebooks and any of the underlying study
24 data related to those three studies in particular, the two rat
25 studies and the dog heart study, need it, you know, like next

1 week. And I know it's Christmas, but we need it soon so we
2 can have our experts look at it before the deposition.

3 MR. GAGE: Judge, this is William Gage. May I
4 respond?

5 THE COURT: Certainly.

6 MR. GAGE: I'll be candid with you, Your Honor. I'm
7 not the one defending Mr. Barbolt's deposition, so I don't
8 know the studies with the level of specificity that Bryan
9 knows them, but I had a call right before I got on this call,
10 and the long story short, Judge, is this:

11 I told my people, I said, "Look, I know that Ethicon
12 closes for a portion of this Christmas holiday," and I said,
13 "I'm getting ready to get on a call with the judge and I am
14 telling her that I am instructing you to call the person" --
15 there's a lady at the company who apparently, if there is
16 stuff that needs to be produced, she's the one that knows
17 where it is.

18 And I said, "I want her called immediately, and I want
19 her, whatever it takes, even if we have to bring her in on our
20 own vacation, and even if the building is closed, to help us
21 locate whatever it is that Bryan is seeking in this regard."

22 So those are the instructions that I've issued to the
23 team, and my hope is we're going to make contact with her
24 today and get something moving quickly.

25 Obviously, Judge, we want this depo to go forward on

1 January 7; and if these documents exist, I want them to get
2 into Bryan's hands as soon as possible.

3 THE COURT: Mr. Aylstock, do you have any idea how
4 voluminous the documents are?

5 MR. AYLSTOCK: Well, we do know just from -- it's
6 called GLP, Good Laboratory Practices, standards, that for the
7 studies, you know -- and it just makes common sense. You
8 don't need a GLP to tell a scientist this, but there's a
9 notebook with handwritten notes and there are consecutively
10 pre-numbered pages for, you know, basically the findings so
11 that, you know, if -- the pages can't be removed and so forth.
12 And I don't know, other than what I was told on Wednesday,
13 which is that not only are there -- does Mr. Barbolt
14 apparently have these, these -- some lab notebooks, but
15 there's an actual vault with notebooks with -- I believe it
16 was 91 separate notebooks of basically all of their -- the lab
17 notebooks from the studies.

18 And, you know, it was a shock to me, frankly, because it
19 was specifically requested in July of 2012, and we had a
20 hearing with Your Honor where this specific RFP was discussed.
21 And what we were told and you were told is that, "No, we're
22 not withholding anything," and then I learned, "Well, these
23 exist and they haven't been produced yet. Would you like to
24 come to Somerville and enter the vault and look through the 91
25 pages and do that?"

1 And I said, "Well, what I'd like is for you to copy those
2 91 notebooks and give them to me immediately." And, you know,
3 that's what I would like. That's what I'm requesting. They
4 should be consecutively numbered, pre-numbered pages, and I'd
5 like them all.

6 I don't know exactly what's in there, and, frankly, I
7 don't think they do either, but it's important that we have
8 this information. It was clearly requested, and it is likely
9 to lead to the discovery of admissible evidence, but I really
10 need those three studies before the Barbolt, in advance, you
11 know, like next week, like I said. So I guess I'd request all
12 of that to be copied, because that's what I was told existed,
13 and produced to us next week.

14 I don't know why Mr. Gage needs to talk to somebody about
15 those 91 notebooks because they're in a vault. Just go send a
16 copy service to go copy.

17 MR. RUBIN: This is Gary Rubin. May I be heard on
18 the issue?

19 THE COURT: Yes.

20 MR. RUBIN: Thank you, Your Honor. I think that we
21 are confusing two issues, and I don't mean that pejoratively,
22 because it's taking us a long time to get a handle on it.
23 It's possible that I'm not communicating it properly when I
24 talk to Mr. Aylstock.

25 The lab notebooks, the 91 that he's talking about -- and

1 I think the number is 90, but that's a separate issue from
2 Mr. Barbolt. The lawyer who is dealing with Mr. Barbolt's
3 from our team, his name is David Thomas. He has specifically
4 asked Mr. Barbolt, "Do you have any personal or company lab
5 notebooks for studies on which you worked other than what is
6 in the study database?" That's the database that I talked
7 about with you, Bryan, when we were talking earlier this week.
8 And his unqualified answer was no.

9 So the notebooks that are in the vault, that is a
10 separate issue from what we need to deal with to get to
11 Mr. Barbolt's deposition. For Mr. Barbolt, to the extent
12 there is any underlying data, that data would be saved in the
13 database of studies together with the study.

14 As to the first study that Mr. Aylstock mentioned, the 91
15 -- the 90-day rat study, we've produced I think it was just
16 under 500 pages out of the database relating to that study.
17 And so our understanding is we have fully produced all of the
18 underlying data there.

19 However, for the 28-day study, we are, as Mr. Gage said,
20 we have asked the client person who deals with this database
21 to go back and look in the database at this 28-day study to
22 see if there are any underlying data. And at the same time we
23 have asked her to do that, we -- as long as she's going to be
24 doing that, we've asked her to take another run at the 90-day
25 rat study to see if there's anything other than these 497

1 pages that we've already produced.

2 Not to talk to you directly, Mr. Aylstock, but you
3 started talking about the 90-day and the 28-day. Now you've
4 mentioned a third study. And I know that you had mentioned a
5 third study, but if you could identify it to us. As long as
6 we're asking this person to go back, we'll ask her to go look
7 for that study as well. Just send us an e-mail and we'll put
8 her on that third study that you've mentioned.

9 MR. AYLSTOCK: And, Your Honor, this is Bryan
10 Aylstock. It's the Burkley degradation study involving
11 polypropylene and the dog heart. It was discussed at length
12 with Mr. Burkley in his deposition.

13 THE COURT: So you ought to be able to have this
14 woman look for that information by the end of next week.

15 MR. GAGE: Absolutely, Judge.

16 THE COURT: All right. Well, whatever you find, get
17 to Mr. Aylstock by the end of next week.

18 Now, let's talk about the 90 or 91 lab notebooks. As I
19 understand what Mr. Rubin has just said, these notebooks are
20 not related to Mr. Barbolt's deposition, but these are
21 documents apparently that have not been provided to the
22 plaintiffs.

23 MR. AYLSTOCK: Well, Your Honor, this is Bryan
24 Aylstock again. They may be. I mean Mr. Barbolt's deposition
25 is a 30(b)(6) deposition and he's a non-retained expert; and,

1 you know, we don't know exactly what's in those lab notebooks,
2 but we would like to see those lab notebooks to -- as they do
3 relate to studies conducted by Ethicon on polypropylene. So
4 we would like to have those, and we'd like to have them right
5 away since apparently they can just be copied.

6 MR. GAGE: And, Judge, I think -- this is William
7 Gage. I think -- and, Gary, you all correct me if I'm wrong
8 because I know you all have been somewhat closer to the issue.

9 I think we've provided Bryan with a long list of studies.
10 There's just been, you know, tons of studies over time, and we
11 asked him to take a look at them and look at the list and let
12 us know which ones are the ones that they might be interested
13 in or which ones might be relevant to them.

14 So there's a lot of information on studies. And, Bryan,
15 I don't know -- you know, Judge, I don't know if we've heard
16 back from Bryan on that, and I'm not sure we know -- and, Your
17 Honor, I would ask Ben or Gary to chime in. I'm not sure that
18 the lab notebooks necessarily relate to any studies that Bryan
19 may or may not choose.

20 In other words, it may be that the studies that -- when
21 he hasn't told us, other than these three, which ones he's
22 interested in, but it may be that the lab notebooks don't have
23 any relevance to the one that he -- to the ones that he is
24 interested in.

25 Gary, have I gotten that correct?

1 MR. RUBIN: Yes, William. Your Honor, this is Gary
2 Rubin. The lab notebooks are notebooks that -- they're not in
3 the study database. They're not associated with any
4 particular studies. They are notebooks by scientists.

5 And the problem that we have with them is that these are
6 handwritten notebooks in jargon, in shorthand, by scientists
7 dealing with a range of issues. I cannot say that they are
8 relevant or that they should go to plaintiffs. And I actually
9 can't agree on the phone that they deal with studies on
10 polypropylene, because I don't know that.

11 And so we have offered to Mr. Aylstock a protocol to
12 invite plaintiffs into the vault at Ethicon to flag pieces of
13 them that they would like, that they think they may be
14 interested in, but then we can use our normal procedures to
15 review and produce.

16 But it's almost as if we're dealing with -- in a sense,
17 these are foreign language documents to the reviewers because
18 of the handwriting and the scientific nature and the jargon.

19 What we talked about on the phone this week is that we
20 would immediately provide a list of who the individuals are
21 who had notebooks associated with them. We will do that. And
22 Mr. Aylstock has asked that we provide the first and last page
23 of these notebooks. And we will also, if there are any, we
24 will endeavor to provide a contents or an index page if we
25 can, but those are items that will need to be -- we'll need

1 approval from the company, and those will need to be copied by
2 hand because these are not electronic documents. These are
3 highly confidential paper documents that exist in a vault, and
4 that is the way that we deal with them. And that's what I've
5 been able -- that's what I've been authorized thus far to
6 offer to Mr. Aylstock.

7 THE COURT: When do you think you could get some
8 sort of an index to these 90 or 91 notebooks at least to the
9 extent that you identify who prepared the notebooks and what,
10 you know, the notebooks pertain to?

11 What I hear you saying, Mr. Rubin, is they might not even
12 pertain to mesh. Is that right?

13 MR. RUBIN: That is correct, Your Honor.

14 THE COURT: So when can you have -- I mean it's only
15 91 notebooks. I would think somebody could go in there and
16 look fairly quickly, maybe in a day, not even a day, to look
17 at -- just glance at them and figure out who prepared them and
18 what they're about.

19 MR. RUBIN: We certainly know who prepared them, and
20 that's something that we'll send to Mr. Aylstock today.

21 The second part of your query, Your Honor, what are they
22 about, that's the difficulty that we're having, again because
23 they are written in handwriting and in jargon. It would
24 require actually going through them with the owners. It's not
25 something that just a member of the legal team or one of the

1 outside counsel could go through.

2 We do have notes about them that might be -- that might
3 be useful. But as I understand them, it's not like one
4 notebook is on topic A, the next notebook is on topic B.
5 These are just notebooks that are used until they are filled
6 up and then the scientists move on to another one.

7 But I hear what you're saying, Your Honor, and I'm going
8 to go back and look for what information we have readily
9 available that might help us and plaintiffs identify whether
10 there's anything in these notebooks that might be useful, and
11 we will give that to Mr. Aylstock.

12 THE COURT: Are you able to tell by the name of the
13 scientist whether or not it would be someone involved or not
14 involved in transvaginal mesh or pelvic mesh?

15 (No response)

16 THE COURT: Hello?

17 MR. GAGE: Gary?

18 MR. RUBIN: I apologize, Your Honor. I'm struggling
19 with answering. I cannot answer that because I don't know
20 what else these individuals might have been involved with.

21 THE COURT: Well, surely there's someone --

22 MR. GAGE: Judge --

23 THE COURT: -- at the company who can tell you --
24 they can look at this list of scientists and they can say,
25 "Well, Dr. Smith never, never had anything to do with mesh."

1 That's not -- I mean Ethicon is a big company. I'm sure they
2 have lots of products. I would think you'd be able to tell
3 just by the names of some of these scientists whether there's
4 any likelihood they would have information in their notebooks
5 pertaining to pelvic mesh.

6 You might be able to eliminate half of the notebooks
7 doing that.

8 MR. GAGE: Judge, if I was listening, that sounds to
9 me like probably the first step, because if you -- if you see
10 a notebook that's by a person that we've never heard of
11 before, the odds are, he or she is not a mesh scientist. And
12 then, conversely, if you see something with a name that we,
13 you know, we all are familiar with in terms of a mesh
14 custodian, then that becomes one that you pull off the desk
15 and you -- you pull off the shelf and you take a closer look
16 at it.

17 THE COURT: Well, somebody is going to need to do
18 that by the end of next week so we have some idea what we're
19 looking at as far as these 91 notebooks go, or 90 notebooks,
20 because that deposition is just right around the corner. And
21 if any of those notebooks are relevant to that deposition,
22 Mr. Aylstock is going to have to have time to review them
23 before he takes the deposition.

24 MR. AYLSTOCK: And, Your Honor, this is Bryan
25 Aylstock again. Here's my issue with this whole thing. I

1 learn about this two days ago. In July of 2012, 17 months
2 ago, request for production number 56 asks for all documents,
3 including but not limited to notebooks and electronic
4 notebooks in your possession, custody, control that pertain to
5 clinical -- from -- provided to clinical investigators or
6 scientists that pertain to past, present, and future pre-
7 clinical studies of the pelvic mesh products.

8 And from what I learned two days ago -- and it was
9 confirmed today -- they have not even asked those scientists
10 what's in those notebooks, which is -- there's a problem for
11 me.

12 I would just add that when it comes to the names,
13 sometimes there may be assistants that keep notebooks whose
14 names we may not know about, and a lot of the studies may
15 relate -- because the claims on the pelvic mesh sometimes
16 relate to hernia mesh testing, I'm not so sure that what we're
17 going to get is going to help us by the 8th.

18 And the only -- I would also add that these GLP standards
19 require there to be a notebook kept for these pre-clinical
20 studies. So unless they violated good lab practices and
21 common sense, notebooks exist; they need to be produced. I
22 don't know where they are, but maybe they're in this vault,
23 but apparently nobody has even talked to the scientists about
24 what's in the notebooks.

25 It's a real problem for me, and we need an answer, and I

1 think the easiest answer is just copy the notebooks and get
2 them to us and let us try to figure it out.

3 THE COURT: Well, that may be the end result, but if
4 there are notebooks in there, I would think somebody at the
5 company is going to know what these people worked on. There's
6 got to be somebody there who's going to know that, and I don't
7 see any point in giving you 50 notebooks that have nothing
8 whatsoever to do with mesh.

9 If there's some way that we can -- and when I say "we," I
10 mean Ethicon -- can look at these notebooks and figure out
11 what they might be about in some quick fashion and maybe
12 eliminate some of them, then they'll have to dig a little
13 deeper with what's left over. But the bottom line is, Ethicon
14 needs to get started doing that ASAP.

15 MR. GAGE: Judge, we're on it.

16 THE COURT: All right. All right. What else do we
17 have?

18 MR. GAGE: Judge, before I forget -- everybody is
19 going to get so mad at me if I forget, and I confess I
20 haven't -- well, I did. I sent an e-mail to Bryan on this.

21 Your Honor, when the plaintiffs filed their spoliation
22 motion, they had requested a waiver of the page limits so that
23 they could, I believe, go to 25 pages.

24 THE COURT: Uh-huh.

25 MR. GAGE: And my briefing team has asked if we

1 could -- if we could ask for a waiver of the page limitation
2 such that we could have 30 pages, with the understanding that
3 in order for both sides to have an equal number, we would be
4 glad if plaintiffs -- or we'd be perfectly happy to let
5 plaintiffs have five more for their reply brief, so that each
6 side gets 30.

7 THE COURT: I don't have a problem with that.

8 MR. GAGE: And, Judge --

9 THE COURT: I don't have a problem with that, but,
10 you know, I've told you before, I'm pretty nuts and bolts. So
11 I like someone to get to the point. If it takes you 30 pages
12 to get to the point, to get all the points covered, that's
13 fine. But if it's 10 pages of points and 20 pages of flowery
14 argument, then don't do it, because I lose my attention span.

15 MR. AYLSTOCK: Well, Your Honor, this is Bryan.
16 With our original draft, there was 48 pages, and so we worked
17 extremely hard to get it to 25 pages. And, you know, I don't
18 have a problem with getting the -- providing the extra five,
19 because when we asked for the five pages, Ethicon or -- it was
20 okay with that. They asked for, "Well, fine, but we'd like an
21 extra five for our response," and so we were fine with that,
22 of course. And so if they'd like ten for their response, we'd
23 just like an extra five for our reply, and we will certainly
24 be filing a reply.

25 And also, just so everybody has a heads-up, we've finally

1 gotten some additional information about several more
2 custodians that apparently don't have a custodial file. One
3 is a John -- Mr. John Clay, who was identified as, on their
4 30(b)(6) notices, the person in charge of the regulatory file
5 for all the TVT products for years, apparently doesn't have a
6 file. Jill Schiaparelli apparently doesn't have a file.
7 Kendra Munchel doesn't have a file. And these are important
8 witnesses.

9 So we'll be filing a supplement next week just to add
10 those individuals and perhaps some others that appear to have
11 severely deficient files to our motion.

12 One is Jill Schiaparelli. She was the main contact
13 person with the Dr. Heniford. The video that I think we've
14 provided in our spoliation was of a Dr. Heniford who Ethicon
15 had designated as a -- both a fact -- we had identified as a
16 fact witness and Ethicon has identified as an expert witness.
17 And I think on our last call, his file was brought up because
18 we still had not received documents we had requested.

19 He kind of falls in that very same category as Drs.
20 Klinge and Klosterhalfen. He's a current consultant for
21 Ethicon, still does a ton of work for them, has a lot of
22 documentation that we know about mesh. He's a mesh scientist
23 and researcher and has, you know, the video that -- he's
24 produced videos for Ethicon and so forth on that concept. And
25 we still don't have that -- those documents.

1 Now, William -- Mr. Gage did pull down -- he's no longer
2 an expert for this case, the *Lewis* case. He was pulled down
3 by Ethicon, but his fact witness deposition remains, and we
4 still would like to get his documents. We lifted heaven and
5 earth to get Klinge's and Klosterhalfen's documents, and we'd
6 like to have those documents for that deposition, but I think
7 they're also probably very relevant to perhaps some of these
8 *Daubert* responses that we're working very hard on and are due
9 next Friday.

10 THE COURT: Well, Mr. Aylstock --

11 MR. GAGE: Judge --

12 THE COURT: -- you've sort of lost me. We were
13 talking about the page limits for these briefs, and all of a
14 sudden I have no idea what you're talking about.

15 So as far as the page limits go, that's fine. You can
16 have your extra pages.

17 Now, was there another issue in there somewhere?

18 MR. GAGE: Your Honor, this is William Gage. With
19 regard to the page limitation and the briefing on the motion,
20 Mr. Aylstock just indicated that he would be supplementing
21 next week to, essentially, I guess, add additional items to
22 his motion.

23 And just so that Your Honor kind of understands what
24 we're doing, you know, we're obviously going through their
25 original motion; and for every alleged act of spoliation, what

1 we're doing is, you know, really marshaling a lot of forces
2 and gathering evidence and such in order to properly respond.

3 I'm concerned that if plaintiffs supplement next week,
4 and, you know, recognizing that Ethicon is -- and most of its
5 employees are gone during the Christmas week, I'm wondering
6 how -- I'm wondering what Your Honor would recommend we do if
7 we get to the response date of Monday, January 6th, on those
8 supplemental issues and we come to the Court and might have to
9 request a little bit of extra time.

10 At one level -- I mean I know Your Honor is very gracious
11 with extra time, and I'm not questioning that, but I wonder --
12 I hate to set Your Honor up for what is essentially two
13 motions, two responses, and two replies.

14 THE COURT: Well, you know, I still haven't looked
15 at the original motion because what I like to do is look at
16 everything at one time so I don't have any kind of
17 preconceived notions that are marinating in my brain before I
18 get the rest of the documents. So I haven't looked at the
19 motion.

20 The only concerns that I have at all about time frames is
21 that I understood Mr. Aylstock to say that some of the relief
22 that the plaintiffs are requesting affects this upcoming trial
23 date. So that's --

24 MR. AYLSTOCK: That's correct.

25 THE COURT: You know, that's my only concern. If it

1 were not -- if it were just the plaintiffs asking for money,
2 some kind of money sanction, it wouldn't be a big deal. But
3 if they're asking for something that might affect a trial in
4 February, then, you know, we're not going to have a lot of
5 extra time for that.

6 MR. GAGE: Well, Judge, what we may want to do is
7 just play it by ear if -- and I would just ask the Court's
8 indulgence and plaintiffs' indulgence, that depending on what
9 the -- the extent of the supplementation and the extent to
10 which we have to go try to, you know, dig up some facts and
11 have them ready on -- by January 6th, that we may have to come
12 back to Your Honor and ask for a brief extension on the
13 supplemental part.

14 THE COURT: Sure.

15 MR. GAGE: Okay.

16 THE COURT: I think we can deal with that as it
17 comes up.

18 All right. Now, Mr. Aylstock, was there some other issue
19 that you were raising?

20 MR. AYLSTOCK: Yeah, and I apologize. The other
21 issue related to our need to get the Heniford documents.
22 Dr. Heniford is a mesh scientist, a current consultant for
23 Ethicon. He's been with them for many, many years, has been
24 paid I think over a million dollars by Ethicon, continuing to
25 be paid, and so he's not only a fact witness, he was a

1 retained expert for Ethicon. And deposition was set and we
2 were in need of his documents. There's that same issue
3 where -- the other side of the coin with Klinge and
4 Klosterhalfen. We still don't have the documents.

5 Now, his expert deposition was withdrawn because he was
6 withdrawn as an expert, but he's still an important fact
7 witness, and we still want his documents. And I'd like to get
8 them -- originally, as the Court may recall, they were
9 supposed to be produced a couple of weeks ago, and Mr. Gage
10 was doing everything he could to do that, and that didn't
11 happen, and now we're here before Christmas and we'd like to
12 get them before the end of the year so we can be ready for the
13 deposition.

14 THE COURT: When is his deposition?

15 MR. GAGE: Your Honor, this is William Gage. What
16 happened was the depo was scheduled, I think, for December 17
17 and 18, and the way we had structured it was the same way that
18 Your Honor had asked that we do the Klinge and Klosterhalfen,
19 which was the fact witness depo for one day, followed by the
20 expert witness depo the next.

21 We are running into some of the same difficulties that
22 plaintiffs ran into when trying to obtain documents from
23 someone who is not your employee and someone who is a doctor
24 and has a hospital affiliation. And it's been difficult.

25 We've gotten a small amount of documents from him, but

1 it's not a complete set. It's not close to a complete set.
2 And so we have people today, including David Thomas, meeting
3 with Dr. Heniford, and that's face-to-face. And the purpose,
4 among other things, is to emphasize the importance of ensuring
5 a complete collection and production of these documents. So
6 that's what we're dealing with.

7 In terms of a depo date, we -- I just got an e-mail from
8 Michael Brown, who's also with David, and he said we are
9 getting a depo date today. And so my hope, Your Honor, is
10 I'll be able to send Bryan a new depo date today.

11 THE COURT: Now, is this a deposition you're trying
12 to take before the trial?

13 MR. GAGE: Yes, Your Honor.

14 MR. AYLSTOCK: Yes, Your Honor, absolutely. And we
15 were hoping to take it before some of our *Daubert* responses
16 were due; but, frankly, you know, Dr. Heniford has made some
17 statements about, you know, the fact that the mesh needs to be
18 lightweight, large pore, and the TVT mesh is heavyweight,
19 small pore, and what that can do. And so as a current
20 employee -- or a current consultant, I think it might be
21 helpful. I'm not, frankly, too concerned about the *Daubert*
22 motions, but maybe I should be. But I certainly would like
23 his deposition as humanly possible. It was set on the 17th
24 and unilaterally withdrawn by Mr. Gage.

25 MR. GAGE: And, Your Honor, this is William Gage.

1 The reason I unilaterally withdrew it was I knew the document
2 situation was not going to be to plaintiffs' liking and
3 certainly not to your liking, and I want the documents fixed
4 before the depo.

5 THE COURT: All right.

6 MR. GAGE: And as I said, Your Honor, we pulled him
7 down as an expert, and he is not -- you know, he's a third
8 party. He's a fact witness. And as you might expect, I don't
9 have the -- we don't have the same degree of control over him
10 as we would, for example, a company witness.

11 THE COURT: All right. Well, let's see what you can
12 get moving on that. I guess you've got about a month to work
13 with as far as getting everything done before trial. So
14 that's not a lot of time.

15 MR. AYLSTOCK: No, Your Honor, not with everything
16 else we have to do.

17 THE COURT: Right. Well, work a little bit more on
18 this and try to get this resolved. And if you can't and you
19 need to talk to me again or need definite deadlines, then just
20 call and I'll do that.

21 MR. AYLSTOCK: Your Honor, another issue that I'd
22 like to bring up and I have discussed with Mr. Gage by e-mail
23 and followed up last night and was hoping to get an answer
24 from him and maybe have it and we can shortcut this, we
25 continue to have issues of documents -- you know, historical

1 documents, not brand new newly created documents, being
2 produced after the witnesses. And then it also goes into this
3 idea that there were lab notebooks in a vault and so on and so
4 forth.

5 And I sent Mr. Gage some orders from other MDLs,
6 including the Pradaxa MDL. And the lawyers defending,
7 Boehringer Ingelheim, there have the same document, I guess --

8 THE REPORTER: I'm sorry. I'm not --

9 MR. AYLSTOCK: -- production company that Mr. Gage
10 is using here. And what that judge did was said, "Look, I'm
11 not -- I'm going to ask you to, you know, have somebody at
12 that document production company say that they've undertaken a
13 good faith effort to do everything and to find the documents
14 so that we don't continually have this issue."

15 I got yesterday -- I think Mr. Watson sent me another
16 production with some more documents which -- so what we'd like
17 and what I proposed to William is can we maybe do that? And
18 if the answer is no, that's fine, we'll brief it for Your
19 Honor so Your Honor can see those orders.

20 I'm not trying to surprise Mr. Gage or say I'm arguing it
21 right now, but that's an issue that we'd like to get briefed
22 and to Your Honor if there isn't some agreement on it.

23 MR. GAGE: Your Honor, this is William Gage. Can I
24 respond?

25 THE COURT: Certainly.

1 MR. GAGE: Your Honor, you know, this business of
2 producing custodial documents is, I have learned, it's a very
3 complicated business. And I have learned stuff in the last
4 five months of doing this that have made me realize that
5 nothing is ever easy when it comes to document production.
6 And in particular on this issue of custodial productions, you
7 know, it's very easy to say, for example, "You have
8 produced -- you know, you've produced this document to me or
9 you produced this witness's custodial documents to me a year
10 ago and then you six months later do a supplemental
11 production. Why is it that you give me a document in the
12 supplemental production that pre-dates the original
13 production?"

14 And at one level, Judge, that's just a -- that's a very
15 good question, and I asked the question recently to my team,
16 "Why does this happen? What's going on?" And they said,
17 "Well, there are a number of reasons that you may see things
18 like that. One would be, for example, privilege downgrades."
19 And Your Honor knows, you know, we review the documents for
20 privilege and sometimes they're marked as privileged and then
21 later they're -- somebody goes back in and reconsiders it or
22 the plaintiffs may contest them and then they end up getting
23 produced because they're no longer -- or the privilege claim
24 is no longer dealt with, or, I was told, that sometimes it's
25 resolution of technical files, meaning there's some, you know,

1 technical issue that has to be worked through.

2 And then another reason that you end up getting
3 documents, maybe not on the post-dating issue, but that you
4 continue to get documents on a particular custodian is because
5 of supplementations. You know, you go -- and some of these
6 people still -- a lot of the people that we've produced for
7 still work for the company, and we've got some schedule -- and
8 I know we've discussed it with Bryan; I think we've shared
9 some data with him -- as to how often we do these supplemental
10 productions.

11 So the long story short is on the custodial productions,
12 there are a lot of different moving parts; and at any one
13 time, any one of those moving parts may give you the sense
14 that the production is not complete. So I understand where
15 Bryan is coming from, but what I think we need to do is if
16 Bryan is really concerned about the completeness, I think we
17 need to deal with it first on a document basis so that we can
18 say -- so that Bryan can say, "These are the documents that
19 create my concern." And then we can go investigate those
20 documents and come back to him and give him our response as to
21 what the deal is. That way we know what we're dealing with,
22 we know what the issues are.

23 And in any event, I share all this with you, Judge,
24 because it's just a -- these custodial productions are
25 relatively complicated things and it's difficult to ever say,

1 boom, this one is forever done and complete, because you've
2 got all these other things happening, like privilege
3 downgrades, technical file issues, and supplementation, which
4 I don't know how -- you know, I don't know how you get around
5 them.

6 MR. AYLSTOCK: Yeah. And, Your Honor, this is Bryan
7 Aylstock. I'm not asking for this as the end-all be-all, but
8 the -- what was done in Pradaxa and ordered by Pradaxa,
9 LeClairRyan, as I understand it, is the document company for
10 both Boehringer Ingelheim and J&J in this litigation. And
11 it's simply an affidavit, and it doesn't say this is the
12 end-all be-all, but it just says, "I've made this affidavit
13 after reasonable inquiry as required under Rule 26; and based
14 on the information that I've been supplied, you know, this is
15 a complete file as best as I know."

16 And I appreciate and commend Mr. Watson, Mr. Gage, you
17 know. When we make an inquiry, you know, typically we can do
18 that, but it just -- it has -- it hasn't been an isolated
19 inquiry. We've been making these inquiries for a year, and
20 it's very difficult for us to know what's there and not there.
21 And when, you know, I hear about a vault with lab notebooks
22 and nobody has even asked the laboratory folks whether there's
23 mesh stuff in there, or I have Tom Barbolt being deposed and
24 I -- there's got to be lab notebooks for this. It's a problem
25 that I think needs to be addressed. And we're prepared to

1 file a motion on it if there's not agreement, and we'll put
2 that in papers.

3 MR. GAGE: Well, Your Honor, if I could just make a
4 couple of comments. First of all, what the -- it's UnitedLex
5 is the name of the group that's working with us, not
6 LeClairRyan. LeClair did it for a while, but it's now
7 UnitedLex. I just wanted the record to be clear on that.

8 But, secondly, Your Honor, I would just say, to kind of
9 close out the issue, I would invite Bryan, with Your Honor's
10 indulgence, to, you know, to meet-and-confer with us on a
11 specific -- a more specific basis, because at 50,000 feet,
12 it's hard to deal with the issue. But when you deal with it
13 in the context of specifics, I think we could provide them
14 with assurances that are -- become much more difficult, you
15 know, at a 50,000-foot level.

16 THE COURT: Well, why don't you see what you can
17 work out together on that.

18 MR. AYLSTOCK: We will, Your Honor.

19 THE COURT: I think Mr. Aylstock's -- the -- sort of
20 the bee in his bonnet is that there's this vault full of these
21 lab notebooks that he's just learned about, and so now he's
22 having doubts that he's been told what really is out there,
23 and his doubts are going to continue until he feels that he
24 gets some sort of reassurance.

25 It may be justified for him to feel that way. Maybe he's

1 overacting a little bit. I don't know. But why don't you
2 talk about it and see what you can work out.

3 MR. GAGE: Yes, Your Honor.

4 MR. AYLSTOCK: I've been accused of overreacting
5 before, but -- okay -- it is more than the lab notebooks.
6 It's -- Ben, we'll try to work it out, and if not, we'll bring
7 it to Your Honor. We certainly -- that's why I provided, I
8 think it was Monday, to William this proposed order, and it
9 wouldn't be groundbreaking for something like that to happen,
10 but we'll see what we can do.

11 THE COURT: Right. I agree. If there are real
12 problems with the extent of the search that's being done by
13 Ethicon, then those kinds of reassurances in writing are a
14 good thing to do.

15 MR. AYLSTOCK: And in particular, given the
16 impending trial, you know, in the *Linda Gross* trial in
17 New Jersey that we had some involvement in, there were
18 thousands and thousands of documents that were produced right
19 on the eve or right during trial. And, you know, I don't know
20 why that happened, but it happened, and I don't want to have
21 that here, because there were some very important documents
22 that didn't get used in that trial because they hadn't been
23 produced.

24 THE COURT: All right. Well, is there anything
25 else?

1 MR. AYLSTOCK: This one should be an easy one, Your
2 Honor. Again, this is Bryan. There's an issue I think in --
3 and maybe Mr. Watson has an answer to it. We were in -- we've
4 been produced a lot of materials that are -- almost everything
5 is in black and white. And the way that the ESI order is
6 drafted, that, you know, if we request something in color, we
7 can get it.

8 But it's become apparent that the defendants' lawyers,
9 because this happened in some of their depositions, they
10 have -- must have a color -- a database or something of color
11 copies, and I'm not sure that we're getting what the ESI
12 requires, that is, some designation that a color copy exists,
13 and if we want it, we can have it.

14 So to the extent that they have all of these marketing
15 brochures and so forth in color, you know, we certainly want
16 them, because they're sometimes illegible literally in black
17 and white. And I'm not throwing stones, because when we ask
18 for them, Mr. Watson is very good to give them to us. But
19 what we'd like is, you know, basically what the defense
20 lawyers have. If they have color copies, we'd like to have
21 the color copies too.

22 THE COURT: Mr. Gage?

23 MR. WATSON: Your Honor -- Your Honor, this is Ben
24 Watson. Mr. Aylstock is correct. It's my recollection -- I
25 don't have it in front of me. My recollection of the ESI

1 protocol is that, you know, if a document has color contents
2 to it, there's a, I guess, a seal, there's a meta data seal
3 that it's locked in. It's my understanding that, you know,
4 that that is certainly there. I'll certainly double check on
5 that. But, yes, any -- you know, any document that he, you
6 know, requests in color, we're certainly glad to give it to
7 him.

8 And, you know, Bryan, if you and I want to talk about
9 that, I'd be glad to work out a way to figure out exactly what
10 it is that you need and we'll get it to you.

11 THE COURT: I think I hear him saying he doesn't
12 always know there is a color copy until later, and so --

13 MR. WATSON: Well, Your Honor --

14 THE COURT: He wants you to give him what you have
15 if it's in color.

16 MR. AYLSTOCK: That's right.

17 MR. WATSON: And I think we're certainly, you know,
18 glad to do that. It's just defining, you know, what it is.
19 If it's marketing brochures, you know, if it's something
20 discrete in the universe, I think that's easy to find and get
21 them out. I just want to make sure I understand what it is
22 that he's interested in.

23 THE COURT: He wants anything you have that's in
24 color. That's what I hear him saying. If you have it in
25 color, he wants a color copy.

1 MR. WATSON: Right. And, Your Honor, I think that,
2 again, I think that everything that we have in color, I think
3 that goes, you know, against the ESI protocol because as I
4 understand it, what it says is that, you know, if there is a
5 color version, we'll mark it in the meta data and then they
6 can make reasonable requests for color copies.

7 So if it's just a blanket request for everything that
8 exists in color, we want it in color, I think Mr. Aylstock and
9 I need to talk about that.

10 THE COURT: Right. I'll order you to do whatever
11 the ESI protocol says.

12 MR. WATSON: Yes, Your Honor.

13 THE COURT: So whatever it says -- and if you
14 don't -- if you can't agree on what it says, then we can take
15 that up. But whatever it says is what you need to do.

16 MR. AYLSTOCK: Your Honor, my point -- and, you
17 know, I don't disagree with what Mr. Watson says about that.
18 What I'm asking -- what I'm suggesting is I -- it seems to me,
19 because we see it at these depositions where multiple color
20 copies are pulled out, not Ethicon, but the Butler Snow
21 lawyers or the defense lawyers have some -- you know, they
22 have some database on their own. I suppose they have an index
23 of copied versions. And to the extent that those lawyers have
24 it, you know, we'd like to be on equal footing with them
25 without having to pick and choose and figure out meta data, if

1 it's there and so forth.

2 THE COURT: Mr. Aylstock, they're going to have to
3 do what the ESI protocol says. Unless the ESI protocol -- if
4 they want to put something in color themselves and it's not --
5 it's not in color from Ethicon or it's not noted to be in
6 color in the meta data, then I don't guess you have a right to
7 have them give you their color versions. You know, they'll
8 have to do whatever the ESI protocol says.

9 MR. AYLSTOCK: Okay. Fair enough, Judge.

10 THE COURT: All right. Okay.

11 MR. AYLSTOCK: And then just a quick follow-up. I
12 had requested some exemplars of the Prolift products looking
13 forward, looking down the road, and I'm not sure where we are
14 on that and some hernia exemplars that Mr. Anderson had
15 requested Miss Jones back in July. And, you know, I just
16 wanted to follow up, put that on the Court's radar, because we
17 still are waiting on that.

18 THE COURT: Does anyone --

19 MR. GAGE: Yeah, Judge, this is William -- this is
20 William Gage. On the exemplars, Judge, we've got -- we've got
21 very few, and we have advised Mr. Aylstock of this. We have
22 very few of some kinds, like, for example, Prolifts, very few
23 of them.

24 When I say very few, if my memory is correct, it's less
25 than ten, but I'm operating off memory, so don't hold me to

1 that number. But it's a very small number.

2 Now, if -- if, for example, they, the plaintiffs, are
3 interested in testing like the mesh as opposed to like testing
4 the full configuration of the Prolift device, I've got a lot
5 more -- I think it's called Gynemesh PS, which are just kind
6 of flat square squares of that type of mesh, so -- but I had
7 very few, like TV -- well, not very -- I've got very few TVT
8 Secur and very few Prolift devices, which are two of the
9 discontinued devices.

10 So one of the things that -- and we've advised Bryan
11 as -- I think it was going back as far as April of this year.
12 One of our concerns is with so few devices remaining, we have
13 to be very careful not to hand all these out and then have
14 them all evaporate or disappear, because we've got other
15 courts that might get on us. And we have to be very careful
16 to make sure we keep some and not let anything happen to them
17 just because of the fact we've got a lot of courts that --
18 other than the MDL, that, you know, we might have to be
19 answerable to.

20 So we've got to be careful with the ones that we have a
21 very small number. And we've already given the plaintiffs
22 some of these. It's not like we've stiffed them on this. As
23 I understand it, they made a request earlier, months and
24 months ago. We produced a number of them to them, and now
25 they're coming back and want more. So it's not a deal where

1 we just told them no.

2 MR. AYLSTOCK: Well, we don't have any Prolifts.

3 You've never given us Prolifts.

4 MR. GAGE: Well, I'll have to go back and check, but
5 in any event, Judge, we have very few. And my take is if I
6 could get Bryan to send me an e-mail that says, "I need this
7 device," and it needs to be very specific as to what he wants
8 and the number, then I will respond and tell him how many we
9 can give him. And then if there's a dispute over the number,
10 then we can come back to Your Honor and I'll say, "Judge, I've
11 got, whatever it is, ten. He wants eight of my ten." And I'm
12 going to say, "Judge, I feel like I can't do that with other
13 Prolift cases pending around the country and give them all to
14 the MDL counsel."

15 So I kind of think that's where we are. It's not that we
16 don't want to cooperate. It's we have to be careful with the
17 ones that we have very few product on.

18 MR. WATSON: Judge, this is Ben Watson. I hate to
19 interrupt. Bryan, you did send me an e-mail, and I think it
20 was broken out by products. And I just want to make sure my
21 memory of that is right. So I think we do have that.

22 MR. GAGE: Okay.

23 MR. AYLSTOCK: I sent that December 2nd after a
24 meet-and-confer with Mr. Watson about that.

25 MR. GAGE: Do you have the hernia products listed in

1 there as well?

2 MR. AYLSTOCK: Yes. PROLENE old construction,
3 PROLENE revision 2, and PROLENE 5 mil to revision 3.

4 So you were copied on that. It was December 2nd at
5 11:08 a.m.

6 MR. GAGE: Judge, you see what happens. I get so
7 many e-mails from Bryan, I can't keep up with them all.

8 THE COURT: Well, why don't you -- you know, why
9 don't you read the e-mail that he sent and then figure out,
10 you know, what you have and what you can supply to him.

11 I understand your concern about handing them all out, and
12 obviously you don't want to do that and I don't want to make
13 you do that, so let's figure out what we can do with what
14 you've got left.

15 MR. GAGE: All right. Thank you, Judge.

16 THE COURT: Do we have anything else?

17 MR. AYLSTOCK: That's all I have right now, Your
18 Honor, for this.

19 MR. GAGE: Judge, I will note for the record that
20 Bryan and I agreed in retrospect at the fact that we did not
21 send each other any e-mails over Thanksgiving was an absolute
22 blessing for both of us. So I'm almost inclined to file a
23 motion asking for no e-mails on Christmas Eve or Christmas
24 Day, but I think Bryan will agree on the record we're not
25 going to do that to each other.

1 MR. AYLSTOCK: We're going to do our best, although
2 all of our *Daubert* responses to all of the *Daubert* motions
3 Mr. Gage's firm filed are due on the 27th, so I don't know if
4 I can do that, but I'll certainly try.

5 THE COURT: Mr. Aylstock is the scrooge in this
6 group I think.

7 UNIDENTIFIED SPEAKER: Very much.

8 THE COURT: Well, you all enjoy your vacation if you
9 get to take any days off next week, and I guess I will talk to
10 you again in a couple of weeks unless something comes up in
11 between.

12 MR. AYLSTOCK: That sounds great, Your Honor. We'll
13 be on the phone in a couple of weeks.

14 THE COURT: All right. Thank you.

15 MR. GAGE: Thank you, Judge.

16 THE COURT: Goodbye.

17 MR. GAGE: Bye-bye.

18 MR. AYLSTOCK: Merry Christmas, everybody.

19 THE COURT: You too.

20 (Conference concluded at 2:55 p.m.)

21 I, Teresa M. Ruffner, certify that the foregoing is a
22 correct transcript from the record of proceedings in the
23 above-entitled matter.

24

25 /s/Teresa M. Ruffner

December 23, 2013